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BRIEF ON MERITS

No. 184

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION,

Petitioner,

v.

THE SECURITIES AND EXCHANGE COMMISSION, THE UNITED CORPORATION, EDWARD R. DOWNING, RANDOLPH PHILLIPS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED CORPORATION

RICHARD JOYCE SMITH,
Attorney for THE UNITED CORPORATION,
No. 40 Wall Street,
New York 5, N. Y.

WILLIAM T. FARLEY,
BERNARD L. SANOFF,
Of Counsel.

Dated: November 20, 1953.

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Opinions Below

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 403) is reported at 203 F. 2d 611. The Findings and Opinion of the Securities and Exchange Commission, dated June 15, 1951 (R. 1),

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NOTE: For convenience, The United Corporation will sometimes be referred to as "United", the Securities and Exchange Commission as "the Commission", the Public Utility Holding Company Act of 1935 as "the Act" and The General Protective Committee for the Holders of Option Warrants of The United Corporation as "the Committee."

supporting the Commission's Order of June 26, 1951 (R. 77), has not yet been officially reported but is set forth in the Commission's Holding Company Act Release No. 10614. A short memorandum is included with the Commission's Order of June 26, 1951, and is set forth with the Order in Holding Company Act Release No. 10643.

Jurisdiction

The Judgment and Decree of the Court of Appeals for the District of Columbia Circuit was entered on March 31, 1953 (R. 426). A petition for rehearing was filed on April 13, 1953 (R. 428), and was denied on April 22, 1953 (R. 446). A petition for a writ of certiorari on behalf of The General Protective Committee for the Holders of Option Warrants of The United Corporation was filed on July 16, 1953. The petition was granted, for a limited question, on October 12, 1953. The jurisdiction of this Court was invoked under 28 U. S. C. A. § 1254(1) and 15 U. S. C. A. § 79x.

Questions Presented

The grant of the petition for writ of certiorari was expressly limited "to the question as to the jurisdiction of a court of appeals or a district court to review orders of the Securities and Exchange Commission."

Statute Involved

The pertinent provisions of the Public Utility Holding Company Act of 1935 are found in Section 11(e) (15 U. S. C. A. § 79k (e)), Section 18(f) (15 U. S. C. A. § 79r (f)) and Section 24(a) (15 U. S. C. A. § 79x (a)). Section 11(e) provides that:

> "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protec-

tion of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b) of this section. If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) of this section and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this title, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

Section 18(f) provides that:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the United States

District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this chapter."

Section 24(a) provides that:

"Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure

to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

Statement

The Order of June 26, 1951 (R. 77-82), reviewed and affirmed by the Court of Appeals, constituted the Commission's determination and disposition of the various points involved in a plan filed by United, a registered holding company, under Section 11(e) of the Act, to complete its compliance with Section 11(b). The plan, as approved, had been amended and modified to meet the requirements of the Commission's Findings and Opinion, dated June 15, 1951 (R. 1), which were based upon the record of prolonged hearings before the Commission on the plan as originally filed by the Company.

The approved plan was made up of several different steps of compliance, namely, an offer by United for a limited period, to exchange designated securities for shares of United Common, or to buy for cash small holdings of United Common; an undertaking to reduce further the Corporation's holdings of the securities of so-called statutory subsidiaries; the cancellation of outstanding warrants to purchase United Common; and, finally, amendments of

the Corporation's charter and by-laws to provide for cumulative voting in elections of directors, and for a fifty percent quorum at stockholder meetings.

The steps authorized by the Commission's Order were separate and distinct. They could not be carried out simultaneously, and they differed in their impacts upon security holders.

The offer to stockholders who wished to withdraw from the enterprise

The offer to exchange shares of Niagara Mohawk Common Stock for shares of United Common, and to buy small holdings of United Common for cash, was carefully circumscribed. In its opinion of June 15, 1951 (R. 43), the Commission had held that such an offer must provide, in terms of the market price of Niagara Mohawk Common at the time of the offer, not less than 97% of the average net asset value of a share of United Common (based upon the market prices of United's entire portfolio). Since that step was geared to the current levels of the securities markets, it had to be strictly limited in duration. The precise provision, as finally authorized, was that such an offer would be made during a fourteen day period beginning on the fifteenth day after the issuance of the Commission's Order (R. 78).

The undertaking to sell the stock of statutory subsidiaries

Another step of the plan was the undertaking to sell, as soon as practicable after the effective date of the plan, all of United's holdings of the Common Stock of South Jersey Gas Company and to reduce, within one year of the effective date of the plan, the remaining holdings of the securities of existing or former statutory subsidiaries so that in no case would United continue to own more than 4.9 per cent of the voting securities of any such company (R. 8-9). This undertaking involved sales of securities that totalled

many millions of dollars. The time of each such sale had to be carefully selected in order to realize the best values for stockholders. It was important that the utmost flexibility be given the management in executing this phase of the plan.

The cancellation of the option warrants and the amendments to the charter and by-laws to provide for cumulative voting and a fifty per cent quorum

Other steps of the plan called for the cancellation of warrants to purchase United Common at $27.50 a share and amendments to the charter and by-laws (without a vote of stockholders) to provide for cumulative voting in the election of directors and a fifty per cent quorum at stockholders meetings. These were steps dictated by the Commission's policy to eliminate existing features in the makeup of a continuing company which are held not to be in conformity with the standards of corporate organization established by the Act (R. 53-57).

But neither of these latter steps had any necessary relationship to the other steps of compliance covered by the Order, i.e., the exchange of securities or the sale of securities. Rather, they were *additional* conditions.

The relation of the Order of June 26, 1951, to prior Orders governing United's compliance with Section 11

The Order of June 26, 1951, was the final Order of a series issued by the Commission to direct United's compliance, as a registered holding company, with Section 11. The first or basic Order was issued on August 14, 1943 (R. 373). It was supported by findings, among other things, that United could meet the requirements of Section 11 of the Act by transforming itself into an investment company. Accordingly, the Corporation was not required to dissolve, but the Order directed it (a) to change its capitalization to a single class of Common Stock, and (b) to take appropriate steps to cease to be a holding company. *The United Corporation*, 13 S. E. C. 854 (1943).

No appeal from this basic Order was taken by the Corporation or by any other person. For the past decade the Commission and the Corporation have been engaged in diligent efforts to fulfill the requirements of that Order.

The first phase of United's program of compliance was taken up with offers to exchange on a *voluntary* basis securities of statutory subsidiaries unretainable by United, and cash, for outstanding shares of United's Preference Stock. An order of the Commission approving the first of these voluntary exchange plans was reviewed and affirmed by the Court of Appeals under the procedure of Section 24(a) of the Act. *Phillips* v. *Securities and Exchange Commission*, 153 F. 2d 27 (2d Cir. 1946), *cert. denied*, 328 U. S. 860 (1946).

The second phase of the program was a plan for the *compulsory* retirement of the remaining shares of Preference Stock. This plan was the subject of enforcement proceedings in the District Court for the District of Delaware. Objections were filed by some Common and Preference stockholders but the District Court upheld the Commission's Order approving the plan and directed enforcement. An appeal to the Court of Appeals was dismissed. *In Re United Corporation*, 82 F. Supp. 196 (Del. 1949), Appeal No. 9935 dismissed (3d Cir. Sept. 19, 1949).

Following the retirement of the Preference Stock, the Corporation proposed and received the approval of the Commission under Section 11(e) of the Act for a *pro rata* distribution of shares of the Common Stock of Niagara Hudson Power Corporation, a statutory subsidiary, to the holders of the United Common (R. 7). No enforcement proceedings were involved in this step but a dissenting stockholder appealed directly to the Court of Appeals under Section 24(a) of the Act. The Commission's Order approving the distribution was affirmed. *Phillips* v. *Securities and Exchange Commission*, 185 F. 2d 746 (D. C. Cir. 1950).

In its opinion approving the distribution of Niagara Hudson Power Corporation common stock, the Commission noted the progress made by United, step by step, to carry out the directives of the basic Order of August, 1943, and stated that United should "undertake to file, promptly, and as its next step, under our order of August 14, 1943, a comprehensive plan under Section 11(e) of the Act, detailing the remaining steps to be taken, and the timing thereof, to complete its transformation into an investment company." *In the Matter of The United Corporation*, — S. E. C. — (1949), Holding Company Act Release No. 9431 (p. 6).

It was in response to this requirement that United incorporated in a single application under Section 11(e) the remaining steps of compliance which the Commission approved, with restrictive conditions and reservations, by its Order of June 26, 1951.

The extent to which an enforcement proceeding was required for the Order of June 26, 1951

Since the proposals grouped together in United's Final Section 11(e) application included those which called only for voluntary action by stockholders (the offer to exchange or buy securities) and those which required only action which the Corporation's management had authority under the charter to take (the sale of portfolio securities), as well as those which would be imposed upon security holders irrespective of their consent (the cancellation of the warrants and the changes in the charter), an Order approving the application *in toto* was not deemed an appropriate subject of an enforcement proceeding in a District Court. An offer by United to exchange securities with any stockholder *wishing* to withdraw from the enterprise would obviously not be susceptible of enforcement by a Court Order directed against stockholders, among others. Moreover, an enforcement Order would be unnecessary for the Corporation's own undertaking to sell the securities of its statutory subsidiaries. On the other hand, United did deem

it appropriate to request that compulsory cancellation of the warrants and the mandatory changes in the charter and by-laws be submitted to the District Court for enforcement.

The Commission approved the application on that basis. It said (R. 79-80):

> "The plan as amended requests that this Commission through its counsel seek enforcement of the parts of the plan which deal with the cancellation of United's outstanding option warrants and with the amendment of United's Certificate of Incorporation and By-Laws. No enforcement has been requested with respect to the other parts of the plan, including the voluntary withdrawal offers which, as noted, are to be made on the 15th day after the issuance of our Order herein, or as soon as practicable thereafter. In view of the possibility of appeals from the parts of the plan as to which enforcement has not been requested and of the development of problems with respect to the availability in the appropriate forum of the record in the proceedings before us, we shall defer applying for court enforcement for the time being."

The Commission's Order specifically provided (R. 80):

> "1. The order entered herein shall not be operative to authorize the consummation of the provisions of the plan as amended relating to the cancellation of United's option warrants or to the amendment of United's Certificate of Incorporation or By-Laws until an appropriate United States District Court shall, upon application thereto, enter an order enforcing said provisions."

The appeal to the Court of Appeals and the motion of the warrant holders to intervene

As the Commission had anticipated, certain Common stockholders, who are now petitioners in this Court in No. 154, sought review, under Section 24(a) of the Act (see p. 4, *supra*), of those phases of the plan which were ob-

jectionable to them and which the Commission determined should become operative without application for District Court enforcement. In their petition under Section 24(a), however, the Common stockholders also requested that the Court of Appeals, rather than a District Court in a Section 11(e) enforcement proceeding, should enforce the cancellation of the warrants and the amendment of the charter and the by-laws (R. 406).

On October 26, 1951, the General Protective Committee for Holders of Option Warrants of The United Corporation filed in the Court of Appeals a motion to intervene in the review proceeding instituted by the Common stockholders under Section 24(a) of the Act (R. 242-245). Claiming that the interests of the holders of option warrants would "necessarily be affected" (R. 243) by the review proceedings instituted under Section 24(a), and that the Order of the Commission, "if affirmed, and the plan, if enforced, would make the warrants worthless" (R. 244), the Committee urged that they should, "by being permitted to intervene in this proceeding, be granted the right given them by Section 11(e)" (R. 244).

Both the Commission and United opposed on jurisdictional grounds the petitioner's motion to intervene (R. 247-252, 254-256). While recognizing that the Court of Appeals clearly had jurisdiction under Section 24(a) to review those provisions of the Commission's Order which became effective without delay (R. 251), the Commission and United contended that the same Court did not have jurisdiction to review the provision relating to the cancellation of the option warrants which, along with the provisions relating to changes in United's charter and by-laws, was expressly made inoperative unless and until enforced by a District Court.

At no time did the Committee join with United and the Commission in urging that the scope of the Court of Appeals' review under Section 24(a) should not be extended

to cover provisions of the Commission's Order which had not yet become operative. On the contrary, the Committee stated that the "assumption of jurisdiction by this Court of the entire order of the Commission will expedite an early final determination of the case" (R. 258-259).

The decision of the Court of Appeals on the question of jurisdiction

The Court below deferred decision on petitioner's motion to intervene until submission of the case on the merits. But it granted petitioner leave to file a brief and to present an oral argument (R. 267). Petitioner filed a brief addressed to the merits of the provision for the cancellation of the warrants. It also presented an oral argument which, by Order of the Court, was limited to the question, "What are the rights of the warrant holders if this Court takes entire jurisdiction" (R. 399).

After consideration of the entire case on the merits, the Court below granted petitioner's motion to intervene (R. 407). Distinguishing the cases cited in the Commission's brief in support of its contention that the Court did not have jurisdiction to review those phases of the plan which were to become operative only upon enforcement by a District Court, and relying upon this Court's decision in *S. E. C. v. Central-Illinois Corp.*, 338 U. S. 96 (1949), the Court concluded that it had "jurisdiction to review the plan in its entirety, as the district court enforcement has not been sought" (R. 419).

The Court, however, concluded that it had no power to enforce the plan as requested in the petition of the Common stockholders. It said (R. 417):

> "It should be observed that a court of appeals has no power to enforce a plan of compliance; when it has affirmed or modified a Commission order of approval, the Commission may then apply to a district court to obtain enforcement. In that event, the

district court has no function except to enforce, since affirmance by the court of appeals necessarily held the plan necessary to effectuate the provisions of §11(b) and fair and equitable to the persons affected thereby, and its ruling is res judicata as to those questions."

On the merits, the Court below affirmed the Commission's Order in its entirety. None of the appellants had sought to stay the offer to exchange securities or cash for United Common. That step of the plan became effective on July 11, 1951, and was concluded on July 24, 1951. Only 457,342 shares of United Common out of a total of 14,529,491 shares outstanding were turned in to the Corporation. Nor was the sale of United's holdings of South Jersey Gas Company stock stayed. That phase of the plan was consummated on July 8, 1952. The appealing Common stockholders did make a motion to stay the sale of Niagara Mohawk Common Stock, which was granted (R. 407). Upon the affirmance of the Commission's Order, the stay was lifted and execution of that step of the plan is now in progress (R. 427).

Summary of Argument

Encompassed within the framework of the Commission's Order here under review are the final steps of a series initiated in 1943 to effectuate United's compliance with Section 11(b) of the Act. Several of the directives issued by the Commission in this final Section 11(e) Order became immediately effective; others were only interlocutory or preliminary in that their operative effect was expressly made to depend upon District Court enforcement. The Commission, in the exercise of sound administrative discretion, determined that United's compliance with the Act would be expedited if the limited enforcement proceedings were deferred.

The Commission expressly anticipated that the provisions of its Order which were final and effective without

District Court approval and enforcement might be reviewed by a Court of Appeals pursuant to Section 24(a), in proceedings that could be instituted by an aggrieved person as soon as the Commission's Order was announced. It contemplated, on the other hand, that the conditional provisions directing the cancellation of the warrants and the amendments to United's charter and by-laws would be reviewed, in the first instance, in a District Court enforcement proceeding instituted by the Commission under Section 11(e).

There is nothing in the review provisions of the Act, or in the decisions of the Courts construing those provisions, which requires that each and every provision of a Commission Order approving a comprehensive Section 11 plan be reviewed or enforced at the same time and by the same Court. Indeed, in the case of United's final plan, it would have been inappropriate for a District Court, acting as a Court of equity, to issue an enforcing decree with respect to that step of the plan which was based on voluntary action by stockholders.

The Courts have held that compliance with Section 11 may be achieved in steps and that the Commission may approve partial plans of compliance. *Phillips* v. *Securities and Exchange Commission*, 185 F. 2d 746, 750 (D. C. Cir. 1950); *Phillips* v. *Securities and Exchange Com'n*, 156 F. 2d 606, 609 (2d Cir. 1946). Thus, the several steps of compliance covered by United's final plan could have been made the subject of separate plans and approved by the Commission in separate Orders, some of which would have been reviewable only by a District Court in an enforcement proceeding (*Okin* v. *Securities and Exchange Commission*, 145 F. 2d 206 (2d Cir. 1944), vacated and remanded for the determination of a limited question, 325 U. S. 840 (1945); *Lownsbury* v. *Securities and Exchange Commission*, 151 F. 2d 217 (3d Cir. 1945), *cert. denied*, 326 U. S. 782 (1946); *Blatchley* v. *Securities and Exchange Commission*, 157 F. 2d 898 (1st Cir. 1946); *Goldfine* v. *Securities and Ex-*

change Commission, 157 F. 2d 899 (1st Cir. 1946)), while others would have been reviewable only by a Court of Appeals under Section 24(a) (*Phillips v. Securities and Exchange Commission*, 153 F. 2d 27 (2d Cir. 1946), *cert. denied*, 328 U. S. 860 (1946)). The avenues of review should not be altered because, for practical administrative reasons, the various steps of compliance were included within the framework of a single plan and approved by a single Order.

The usual procedure has been to frame a Section 11 plan so that judicial review may be had in one Court, or to split the plan into several steps so that the Commission may approve each successive step by separate Order. Four of United's previous steps under Section 11(e) were successively approved by separate Orders of the Commission and, in all but one case, reviewed in a Court of Appeals under Section 24(a).

In the present case, however, practical considerations dictated the Commission's determination to approve a comprehensive plan, but to frame its Order so that a portion of the plan would not become operative unless and until it was enforced by a District Court. Judicial review of the Commission's determination should not entail a substitution of a Court's view of expediency for that of the Commission (*In Re Standard Gas & Electric Co.*, 151 F. 2d 326 (3d Cir. 1945), *cert. denied, sub nom., Guaranty Trust Co., Trustee, et al.* v. *Securities & Exchange Commission*, 327 U. S. 796 (1946)), especially in a field where Congress has delegated broad discretion to the administrative body to determine the remedial measures required in a particular case (*American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90 (1946)).

The objections of the Common stockholders to various provisions of the Commission's Order were fully reviewed in the Court of Appeals, pursuant to Section 24(a). The review and affirmance of those provisions involved a consideration of issues entirely different from and independent

of the issues raised by the objections of the option warrant holders.

Neither the petitioner nor any other party in this proceeding has questioned the jurisdiction of the Court of Appeals to review directly, under Section 24(a), those provisions of the Commission's Order which were final and effective without District Court enforcement. The rights of any person claiming to be aggrieved by such provisions could only have been safeguarded in this particular case by the ready access to the Court of Appeals provided by Section 24(a).

Any remand in this case should be for the limited purpose of modifying the judgment of the Court of Appeals on the provisions of the plan relating to the cancellation of the option warrants and the changes in the charter and by-laws. The Court should hold that in all other respects the Court of Appeals had jurisdiction to pass upon the petition of the Common stockholders for a review of the Order of June 26, 1951.

ARGUMENT

The Court of Appeals had jurisdiction to review those directives of the Commission's Order that were not conditioned upon an enforcement proceeding in the District Court.

The question to be decided under this writ calls for a construction of the review sections of the Public Utility Holding Company Act as applied to a particular Order of the Securities and Exchange Commission issued under that Act.

The Act contains broad provisions for a review in the United States Court of Appeals. The review there may be obtained by "any person or party aggrieved" by an Order

(Section 24(a), *supra* at pp. 4-5). These provisions were undoubtedly intended by the Congress to provide the avenue generally to be used by persons wishing to review regulatory action taken by the Commission under the Act.

Provision was also made for the bringing of an action by the Commission itself in a United States District Court to enjoin violations of the Act or any rule, regulation or order thereunder (Section 18(f), *supra* at pp. 3-4) and, upon application of the Commission, for the issuance of a writ of mandamus by a District Court commanding any person to comply with the provisions of the Act or any rule, regulation or order of the Commission thereunder (Section 18(g)).

The provisions of Sections 18(f) and 18(g) were obviously intended to implement the Commission's authority under the Act against recalcitrant parties. They also afford an opportunity for reviewing the validity of the authority asserted by the Commission, since the invalidity of the administrative action would be a proper defense in an action for an injunction and a proper answer to an application for a writ of mandamus. *Power Comm'n* v. *Panhandle Co.*, 337 U. S. 498, 515 (1949); Davis, Administrative Law (1950), p. 752.

But the provisions of 18(f) and 18(g) could not whittle down or modify the broad review provisions of Section 24(a). Not only in the case of the Securities and Exchange Commission under the Public Utility Holding Company Act, but also in the cases of the other modern regulatory agencies of the federal government, the recognized hierarchy of judicial review has been comprised of the administrative agency itself as the Court of first instance, with the Court of Appeals as the Court of immediate and final review, subject only to the established jurisdiction of the Supreme Court. Civil Aeronautics Act, 49 U. S. C. A. 646; Securities Act of 1933, 15 U. S. C. A. § 77i; Securities and Exchange Act of 1934, 15 U. S. C. A. § 78y; The National Labor Relations Act, 29 U. S. C. A. § 160(f).

The function of the District Court in the scheme of judicial review is auxiliary. It is to serve as the strong right arm of the administrative agency. Section 11(d) of the Act authorizes the Commission to apply to the District Court on its own motion to enforce compliance of an Order issued under Section 11(b) (proceedings originated by the Commission itself). Section 11(e) authorizes such procedure at the request of the company filing a plan under that Section. In both cases the reference is to the procedure established by Section 18(f). The provision in Section 11(e) requiring the enforcing Court first to find the Plan fair and equitable does no more than give expression to an established principle governing the enforcement of an administrative act. See p. 17, *supra*.

As this Court has stated, the primary object of § 11(e) "was to enable the Commission, by giving it the authority to invoke the court's power, *to mobilize the judicial authority in carrying out the policies of the Act*. To do this the court 'as a court of equity' was authorized to 'take exclusive jurisdiction and possession of' the company or companies and their assets and to appoint a trustee to hold and administer the assets under the court's direction." *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. 96, 125 (1949). (Emphasis supplied.)

The practice followed in reviewing Section 11(e) plans

Heretofore, it has usually been possible to channel review proceedings on Section 11(e) plans to a single Court because by practice an entire plan has either been approved without reference to an Order of enforcement, or its effectiveness has been made entirely subject to an Order of the District Court. However, in at least one instance prior to the present case, District Court enforcement was sought for and was limited to one of several steps of an approved plan. *In Re American Gas & Power Co.*, 55 F. Supp. 756 (Del. 1944).

Where the effectiveness of the *entire* Order has been conditioned upon District Court review and enforce-

ment, review in the first instance by a Court of Appeals acting under Section 24(a) has been held to be improper. *Okin* v. *Securities and Exchange Commission*, 145 F. 2d 206 (2d Cir. 1944), vacated and remanded for the determination of a limited question, 325 U. S. 840 (1945); *Lounsbury* v. *Securities and Exchange Commission*, 151 F. 2d 217 (3d Cir. 1945), *cert. denied*, 326 U. S. 782 (1946); *Blatchley* v. *Securities and Exchange Commission*, 157 F. 2d 898 (1st Cir. 1946); *Goldfine* v. *Securities and Exchange Commission*, 157 F. 2d 899 (1st Cir. 1946).

Where the Commission's Order has become immediately effective, aggrieved persons have been permitted to invoke the broad review available under Section 24(a). *Phillips* v. *Securities and Exchange Commission*, 153 F. 2d 27 (2d Cir. 1946), *cert. denied*, 328 U. S. 860 (1946). In that case the Court of Appeals compared the general purpose of Section 24(a) with the specified purpose of Section 18(f) as follows (153 F. 2d at pp. 29-30):

> "* * * avoidance of unnecessary court action would suggest that litigation should not be forced upon the Commission and the company when neither finds it necessary, the general provision for review given a person aggrieved being adequate protection to dissenters. And in the face of the very clearly permissive wording of the statute, we are not disposed to strain for an interpretation of the statute which will force unneeded enforcement proceedings. We do not believe this choice of language can be considered inadvertent; in fact, the general provisions for enforcing compliance with the Act and regulations and orders thereunder, § 18(f), seem unusually explicit, stating that the Commission 'may in its discretion' bring an action in the proper district court. Here the Commission has not applied for enforcement under (d) nor has United asked for action under (e). Hence the terms of the statute do not apply, and the petitioner's rights are safeguarded by his present petition. * * *"

All plans or steps of compliance do not require District Court enforcement. The limited purpose of that procedure

was stated in *Commonwealth & South. Corp.* v. *Securities & Exch. Com'n*, 134 F. 2d 747, 751 (3rd Cir. 1943), as follows:

> "* * * If the plan is one which can be carried out by the sole action of the parties thereto no further proceedings are needed. If not, the subsection authorizes the Commission, at the request of the company proposing the plan, to make application to a district court to enforce and carry out the plan. * * *"

And (*id.*):

> "It is obvious that in many cases the desired result may be reached in more than one way. Congress evidently intended to permit the Commission to leave to the company involved the initiative in suggesting from among the available alternative methods that one which it deems most appropriate. This seems clear in the light of the fact that under Section 11(e) the company is not restricted to proposing a plan of compliance which it is in a position to carry out itself but it may also propose a plan affecting the rights of third persons which it may, through the Commission, request a court to enforce against the opposition of those third persons. * * *"

Typically, all plans which have called only for voluntary action by stockholders or which have required for their effectiveness only action by the company's management have been reviewed, if at all, under the general provisions of Section 24(a). On the other hand, it has been usual for a company filing a plan under Section 11(e) to request District Court review and enforcement of a plan which sought to *impose* changes on security holders irrespective of their consent or to make drastic changes in the corporate set-up or business which might engender question in some future litigation. Thus, by use of the enforcement procedure a company proposing a plan has been able to secure protection, if needed, in situations of anticipated recalcitrance, while at the same time due process of law has been assured for any objecting person.

The separate steps constituting United's final plan

The scope of United's final Section 11(e) plan was dictated by the Commission's statement in 1949 (*supra* at p. 9), that the time had come for United to submit one final plan which would embrace all the remaining steps to be taken by United to achieve compliance with Section 11(b). It was necessary to include in United's final plan several different steps of compliance, namely, an offer to exchange portfolio securities and cash for outstanding shares of United Common, an undertaking to reduce the Company's holdings of the voting securities of statutory subsidiaries, the cancellation of the option warrants and the charter and by-law amendments for cumulative voting and quorum requirements.

Although joined together under a single, comprehensive plan, the various separate steps of compliance retained their differentiating characteristics. The exchange plan still called for only voluntary action by stockholders; the sale of portfolio securities required action only by the management; and the cancellation of the option warrants and the amendments to the charter and by-laws were still to be imposed upon the security holders regardless of their wishes.

In light of this, it would have been neither sensible nor appropriate for United to have requested the Commission to apply to a District Court for an Order enforcing all of the steps of the final plan. It would not have been sensible, because the protracted enforcement procedure would have jeopardized the execution of voluntary exchanges with stockholders which were geared to the securities markets at that time. It would not have been appropriate, because the District Court, as a Court of equity, should not have been called upon to issue a futile decree, e.g., "enforcing" a voluntary exchange plan. *Hamilton-Brown Shoe Co.* v. *National Labor R. Board*, 104 F. 2d 49 (8th Cir. 1939); *Bowles* v. *Swift & Co.*, 56 F. Supp. 679 (Del. 1944).

The makeup of the Commission's Order approving United's Final Plan was dictated by practical considerations

To expedite United's final compliance with the Act, and, at the same time, to avoid a situation in which the consummation of a vital portion of the plan would have to await the approval and enforcement of other and unrelated portions of the plan, the Commission approved United's entire plan, but framed its Order so that the compulsory provisions would not become operative unless and until they were enforced by a District Court. Judicial review of the Commission's determination does not call for or permit the substitution of a Court's view for that of the Commission on what is practical for a particular administrative task. As stated in *In Re Standard Gas & Electric Co.*, 151 F. 2d 326, 333 (3d Cir. 1945), *cert. denied, sub nom., Guaranty Trust Co., Trustee, et al., v. Securities & Exchange Commission*, 327 U. S. 796 (1946):

> "It can be set out as a well established rule of administrative law that the action of an expert administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the administrative body has lost sight of the law. The more technical the subject matter before the administrative tribunal, the more reluctant the court should be, we think, in disagreeing with it on a matter which is a question of judgment. The subject matter of this Act is highly technical. It seems to us that it is unlikely that Congress, in vesting authority to handle reorganizations of great public utility empires under the statute, would give the expert less power than bodies for easier and less complicated pieces of work unquestionably have. * * * We do not think that the District Court or appellate court is to substitute its notion of practical expedience for that of the Commission."

Especially is this true in a field where Congress has delegated broad discretion to the administrative body to

determine the remedial measures required in particular cases. *American Power & Light Co.* v. *S. E. C.*, 329 U. S. 90 (1946).

The fact that the Commission's approval of United's final steps of compliance was given in the form of a single Order rather than in the form of separate, successive Orders should not alter the avenue of review applicable to each step.

Under the discretion granted to it by the Act, the Commission could readily have required that United submit separate plans covering the same steps of compliance, and approved those plans by separate Orders. The Court of Appeals for the Second Circuit construed the Act on this point as follows (*Phillips* v. *Securities and Exchange Com'n*, 156 F. 2d 606, 609):

> "* * * There is nothing in the Act which says every order must be an all-or-none one, and that strict compliance with the ultimate objective must be forced at once—as if that were even remotely possible, in view of the intricacy of these huge financial structures. * * *"

Had the Commission followed this step-by-step procedure, its Order approving the plan covering the voluntary exchange of securities and the sale of unretainable assets would have become immediately effective and would have been subject to review in a Court of Appeals under Section 24(a), while the Order approving the plan relating to the cancellation of the option warrants and the changes in United's Charter and by-laws would have been conditioned upon District Court approval and enforcement and would, therefore, have been reviewable by a District Court under Section 11(e) (*Okin* v. *Securities and Exchange Commission*, 145 F. 2d 206 (2d Cir. 1944), vacated and remanded for the determination of a limited question, 325 U. S. 840 (1945); *Lownsbury* v. *Securities and Exchange Commission*, 151 F. 2d 217 (3d Cir. 1945), *cert. denied*, 326 U. S. 782 (1946)).

Indeed, in the case of United itself, the Commission had previously approved by separate Orders four successive plans of compliance proposed by United under Section 11(e) (see p. 8, *supra*). And its Orders approving those plans were separately reviewed, two in Courts of Appeals under Section 24(a) (*Phillips* v. *Securities and Exchange Commission*, 153 F. 2d 27 (2d Cir. 1946), *cert. denied*, 328 U. S. 860 (1946); *Phillips* v. *Securities and Exchange Commission*, 185 F. 2d 746 (D. C. Cir. 1950)), and one in a District Court enforcement proceeding under Section 11(e) (In *Re United Corporation*, 82 F. Supp. 196 (Del. 1949), Appeal No. 9935 dismissed (3d Cir. Sept. 19, 1949)).

The substance of what the Commission approves, rather than the form which its approval takes, should determine the applicable avenues of review. Cf. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 141-143 (1939). The fact that the Commission has approved by a single Order that which it might just as well have approved by separate Orders should make no difference in the review procedure.

The prior decisions of this Court do not require review of the entire plan in the District Court

Nothing in the prior decisions of this Court warrants any contention that a Commission Order approving a plan under Section 11(e) which covers important voluntary steps as well as incidental compulsory action must be subject to review in its entirety under the enforcement procedure of that Section. In *S. E. C.* v. *Central Illinois Corp.*, 338 U. S. 96 (1949), this Court determined only that the scope of review to be exercised by a District Court in an enforcement proceeding was no broader than that exercised by a Court of Appeals under Section 24(a). That case did not involve the question whether one portion of a Commission Order could be subject to review in a Court of Appeals, while another portion of the same Order was subject to review in a District Court.

A case, however, in which the question seems to have been involved is *Okin* v. *Securities and Exchange Commission*, 145 F. 2d 206 (2d Cir. 1944), vacated and remanded, 325 U. S. 840 (1945). In that case, a single Order of the Commission had approved a plan under Section 11(e) for the reorganization of United Gas Corporation, and a settlement of claims between the stockholders of United Gas, Electric Power and Light Corporation and Electric Bond and Share Company, the parent of both companies. The Order also licensed Electric Bond and Share Company's use of the proceeds derived from the plan of reorganization. Electric Bond and Share, in fact, conditioned its joinder in the plan upon the issuance of an Order licensing its use of the proceeds. Under the terms of the Commission's Order, the entire plan and the licensing of the use of the proceeds were to become operative only upon the entry of an enforcement Order by an appropriate District Court.

Okin, a stockholder of Bond and Share, filed a petition in the Court of Appeals for review of the entire Order pursuant to Section 24(a). The Commission's motion to dismiss the petition was granted "because of the interlocutory nature of the Commission's action" (145 F. 2d at p. 207). This Court granted certiorari limited to "*the question whether that part of the Commission's order which licensed Electric Bond and Share Company's use of the proceeds derived from the plan of reorganization can be reviewed only under § 24(a)*" (325 U. S. 840) (Emphasis supplied), and vacated the judgment and remanded the cause to the Court of Appeals for consideration of that question.

After remand, Okin contended that the Court of Appeals was required to review his entire petition and the Commission's entire Order. This contention was rejected, and the Court of Appeals reinstated the case for consideration only of the question raised by this Court.*

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* On May 10, 1948, the petition was dismissed pursuant to stipulation.

It would seem that this Court's action in the *Okin* case at least recognized the possibility that an Order of the Commission covering distinct steps was divisible into those steps for purposes of judicial review.

The Court of Appeals had jurisdiction to review the parts of the Order challenged by the Common stockholders.

The review in the Court of Appeals below was brought under Section 24(a) upon the petition of Common stockholders claiming to be aggrieved by various provisions of the Commission's Order. Most particularly, they objected to the Commission's approval of United's continued existence as the type of investment company proposed by the management.

The objections of the Common stockholders were fully reviewed in an appropriate forum chosen by them under Section 24(a). Affirming the Commission's Order, the Court of Appeals determined, as a matter of law, that it was "within the discretion of the Commission to permit a public utility holding company to cease to be such by becoming an investment company and that it is not required by the statute to order dissolution" (R. 421), and, as a matter of fact, that there was "evidence in the record to support the Commission in exercising its discretion to permit United to survive" (R. 421). Clearly these determinations of law and of fact involved considerations entirely different from and independent of those involved in a review of the provisions to which the option warrant holders objected.

Neither the petitioner nor any other party in this proceeding has questioned the jurisdiction of the Court of Appeals below to review, under Section 24(a), those parts of the Commission's Order which were final and effective without District Court enforcement. The ready access to the Court of Appeals provided by Section 24(a) was neces-

sary to safeguard the rights of any person claiming to be aggrieved by those immediately effective steps of the approved plan.

Conclusion

Should this Court determine that the Court of Appeals did not have jurisdiction to review the provisions which by the Commission's Order were conditioned upon an enforcement proceeding in the District Court, the remand should be to the Court of Appeals for the limited purpose of having that Court's judgment modified only with respect to those provisions. The Court should hold that in all other respects the Court of Appeals had jurisdiction to pass upon the petition of the Common stockholders for a review of the Order of June 26, 1951.

Respectfully submitted,

RICHARD JOYCE SMITH,

RICHARD JOYCE SMITH,
Attorney for THE UNITED CORPORATION,
No. 40 Wall Street,
New York 5, N. Y.

WILLIAM T. FARLEY,
BERNARD L. SANDS,
Of Counsel.

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